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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~273.~~ 30

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE PHILADELPHIA AND READING RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED AUGUST 4, 1884.

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1 UNITED STATES,
Eastern District of Pennsylvania, sct.:

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between the United States of America, plaintiffs in error, and the Philadelphia and Reading Railroad Company, defendant in error, in a plea of trespass on the case, a manifest error has intervened, to the great damage of the said the United States of America, as in its complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 12th day of February, A. D. one thousand eight hundred and eighty-four, and in the one hundred and eighth year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To the Philadelphia and Reading Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-four.

WM. BUTLER, *Judge.*

Service accepted.

JAMES E. GOWEN.

MARCH 31, 1884.

3 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit.

THE UNITED STATES OF AMERICA, plaintiff in error,
vs.
THE PHILADELPHIA AND READING RAILROAD Company, defendant in error.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October session, 1883, No. 2.

It is thus contained:

Be it remembered that on the 18th day of June, A. D. 1883, John K. Valentine, esq., United States attorney, comes into court here and sues forth therefrom a writ of error, directed to the district court of the United States for the eastern district of Pennsylvania, which, with the en-
4 dorsement and return thereto, is in the words and figures following, to wit:

5 In the district court of the United States for the eastern district of Pennsylvania. Of February sessions, 1880. No. 126.

Pleas before the honorable, the judge of said court.

It is thus contained:

THE UNITED STATES OF AMERICA
vs.
THE PHILADELPHIA AND READING RAILROAD Company. } Summons case.

Be it remembered that on the 4th day of March, A. D. 1880, upon præcipe filed by John K. Valentine, esq., attorney of the United States for the eastern district of Pennsylvania, a writ of summons case issued, which, with the return of the marshall thereto, is in the words and figures following, to wit:

6 UNITED STATES,
Eastern District of Pennsylvania, ss:

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you summon the Philadelphia and Reading Railroad Company, late of your district, if it may be found therein, so that it be and appear before the judge of the district court of the United States for the eastern district of Pennsylvania, at a session of the same court to be holden at Philadelphia, on the first Monday of April next, to answer to the United States of America of a plea of trespass on the case, &c. And have you then there this writ.

Witness the honorable William Butler, judge of said court, at Phila-

delphia, this fourth day of March, A. D. 1880, and in the one hundred and fourth year of the Independence of the United States.

[SEAL.] W. W. CRAIG,
Pro Clerk of District Court.

(Marshal's return endorsed:)

6½ Service accepted for defendant. The clerk will please enter my appearance.

JAMES E. GOWEN, *P'lf.*

MARCH 10, '80.

Service accepted as appears above.
So answers—

JAMES N. KERNS,
U. S. Marshall.
Pr. C. McCORMICK,
Deputy.

7 And afterwards, to wit, on the 27th day of January, A. D. 1881, John K. Valentine, esq., attorney as aforesaid, declares against the said the Philadelphia and Reading Railroad Company in the words and figures following, to wit:

In the district court of the United States for the eastern district of Pennsylvania. Of February sess., 1880. No. 126.

UNITED STATES
vs.
THE PHILA. & READING R. R. CO.

EASTERN DISTRICT OF PENN'A, *ss:*

The Philadelphia and Reading Railroad Company, late of the district aforesaid, defendant, was summoned to answer the United States of America, plaintiffs, of a plea of trespass on the case, &c. Whereupon the said plaintiffs, by John K. Valentine, esq'r, their attorney, complains:

8 For that whereas the defendant on the 31st day of November, 1866, at the district aforesaid, was indebted to the plaintiffs in three hundred thousand dollars, for goods then and there sold and delivered by the plaintiffs to the defendant at its request.

2. And also in the further sum of three hundred thousand dollars, for goods then and there bargained and sold by the plaintiffs to the defendant at its request.

3. And also in the further sum of three hundred thousand dollars, for work then and there done, and materials for the same provided, by the plaintiffs for the defendant at its request.

4. And also in the further sum of three hundred thousand dollars, for money then and there lent by the plaintiffs to the defendant at its request.

5. And also in the further sum of three hundred thousand dollars, for money then and there paid by the plaintiffs for the use of the defendant at its request.

6. And also in the further sum of three hundred thousand dol-
9 lars, for money then and there had and received by the defendant for the use of the plaintiffs.

7. And also in the further sum of three hundred thousand dollars, for

money found to be due from the defendant to the plaintiffs on an account then and there stated between them.

8. And also in the further sum of three hundred thousand dollars, for interest then and there due and payable, for the forbearance by the plaintiffs at the defendant's request for moneys before then due and owing from the defendant to the plaintiffs.

9. And also in the further sum of three hundred thousand dollars, like lawful money, then and there due to the said plaintiffs by the said defendant for internal-revenue taxes accruing to the said plaintiffs between June 30th, 1864, and November 31st, 1866, said internal-revenue taxes then and there amounting to the sum of one hundred and forty thousand four hundred and fifty-four dollars and sixty-one cents.

10 10. And also the further sum of three hundred thousand dollars, like lawful money, then and there due to the said plaintiffs by the said defendant by reason of the failure of said defendant to pay to the said plaintiffs the sum of one hundred and forty thousand four hundred and fifty-four dollars and sixty-one cents, then and there due by said defendant to said plaintiffs for internal-revenue taxes between June 30th, 1864, and November 31st, 1866.

And the defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration of the several last-mentioned promises, respectively, then and there promised the plaintiffs to pay them the said several last-mentioned moneys, respectively, on request, yet the defendant hath diregarded his promises, and hath not paid any of the said moneys, or any part thereof, to the damage of the plaintiffs, three hundred thousand dollars.

And therefore they bring suit, &c.

JOHN K. VALENTINE,
Attorney for the United States.

11 And afterwards, to wit, on the 19th day of February, A. D. 1881, the said the Philadelphia and Reading Railroad Company, by its attorney, James E. Gowen, esq., make their plea in the words following, to wit:

The defendant, by James E. Gowen, its attorney, pleads non-assumpsit, payment, and set-off, with leave, &c.

JAMES E. GOWEN, *P. C.*

FEB'Y 19, 1881.

And afterwards, to wit, on the 2nd day of April, A. D. 1883, an agreement in writing is filed, in the words and figures following, to wit:

THE UNITED STATES *vs.* THE PHILADELPHIA & READING R. R. Co. } C. C. U. S. Feb'y session, 1880. No. 126.

It is hereby agreed that the above case may be tried before a 12 jury selected from the panel of jurors in attendance at the session of the U. S. circuit court commencing on the first Monday of April, 1883.

JOHN K. VALENTINE,
Att'y for U. S.
JAMES E. GOWEN,
For R. R. Co.

And thereupon, on the same day, to wit, the 2nd day of April, 1883 it is ordered that a jury come and try the issue joined in this cause.

And thereupon, on the same day, come the parties aforesaid, and the jurors of the jury aforesaid being called, likewise come, to wit:

1. Edward A. Silliman.
2. Thomas Johnston.
3. John M. Driver.
4. George Hand.
5. William T. Kirk.
6. Wm. H. Hulick.
7. Alfred W. Allen.
8. Theophilus U. Neff.
9. Henry S. Cope.
10. Jackson McAbee.
11. Wesley White.
12. Seymour Raymond.

13 Who are duly empanelled, returned, chosen, tried, & sworn or affirmed to speak the truth in the issue joined in this cause between the United States of America and the Philadelphia & Reading Railroad Company.

And afterwards, to wit, on the 3rd day of April, A. D. 1883, the jurors aforesaid, upon their oaths and affirmations aforesaid, do say that upon the issue joined in this cause the' find for the defendant.

And thereupon, on motion of James E. Gowen, esq., attorney for the Philadelphia and Reading Railroad Company, it is considered and adjudged that the said plaintiffs, The United States of America, take nothing by their said writ, and that the said defendants, The Philadelphia & Reading Railroad Company, do go thereof without day.

14 And afterwards, a bill of exceptions duly signed by the honorable the judge of the court here, and assignment of errors with prayer for reversal of the judgment entered being filed, are in the words and figures following, to wit:

In the district court of the United States for the eastern district of Pennsylvania, of February sessions, 1880, No. 126.

THE UNITED STATES OF AMERICA
vs.
THE PHILADELPHIA AND READING RAILROAD Company.

Be it remembered, that in the said sessions of February, A. D. 1880, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of trespass on the case, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

15 And afterwards, to wit, at a session of said court, held at the district aforesaid before the honorable William Butler, judge of the said court, at Philadelphia, on Monday, the second day of October, A. D. 1883, the aforesaid issue between the said parties came to be tried by a jury selected from the panel of jurors in attendance at the session of the circuit court of the United States, commencing on the first Monday of April, 1883, for that purpose duly empannelled by agreement

of the parties, at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impannelled to try the said issue being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff called as a witness Stanley Plummer, who, being duly sworn, was examined by Mr. Valentine.

Q. How are you employed, Mr. Plummer?

A. I am a United States internal-revenue agent.

Q. How long have you been so employed?

16 A. Between six and seven years.

Q. Have you made an examination of the books and accounts of the Philadelphia & Reading Railroad Company, from the 30th of June, 1864, down to the 30th of November, 1867?

A. Yes, sir.

Q. Have you there the result or a summarized statement of the result of your investigation?

A. I have.

Q. What do the last figures on your paper represent—the $40,844.19?

A. The amount of taxes on surplus or profits over dividends for the period from June 30th, 1864, to November 30th, 1867, remaining due and unpaid by the Philadelphia and Reading Railroad.

Q. At what time?

A. November 30th, 1867.

Q. Now, Mr. Plummer, take the statement you have in your hand and explain in a concise manner how this is made up. Take the first item and go slowly and explain it.

A. The fiscal year of the company ends November 30th of each

17 year; the tax or surplus on profits over dividends began June 30th, 1864, and consequently, the first period for which the computation was made up was the period from June 30th, 1864, to November 30th, 1864, at the close of the fiscal year, when the books of the company were balanced. The method of arriving at the surplus or profits over dividends for any period would be to charge the company the receipts from all sources in operating the road, and credit them with the expenses of operating the road, keeping it in repair, taxes, and all items of that character, and deducting the expenses from the receipts, would show the surplus or net earnings. I pursued that method for this period of five months from June 30th, 1864, to November 30th, 1864, with the result shown in this statement.

Q. Take the first and explain the items.

A. The first item is the total receipts from operating the road,

18 $4,794,032.74, which are the exact figures taken from the books and business statements and papers of the corporation. In addition to that they had an income during that period of rents from the Schuylkill Navigation Company, which amounted to $97,528.04.

Q. How did you obtain that sum?

A. This rental was a yearly rental, and in dealing with the period of five months, the last five months of the fiscal year, I charged them with five-twelfths the amount for the year, and this sum of $97,528.04 represents five-twelfths of the total rent received from the Schuylkill Naviga-

tion Company for the entire fiscal year. Having arrived at the total income or receipts, I next credited them.

Q. The $4,794,032.74 are what?

A. The exact receipts, month by month, for the five months, being kept in the accounts monthly, so that the exact figures could be taken, but in that case the Schuylkill Navigation rent was a yearly matter and taken pro rata.

Q. Then, go on.

19 A. The total working expenses except and account called "renewal fund," about which there was some doubt whether it represented construction and was taxable, or whether it was really repairs and the company were entitled to it as an expense for keeping up their road. I kept that separate so that the Department might pass upon its character how it would be treated; consequently leaving that out *of* the total working expenses for the five months, taken accurately from the papers and books of the company, were $2,345,018.11. In addition to that there was a State tax on dividends not included in the accounts for working expenses to which the company would be entitled to credit in arriving at their surplus; that amounted to $54,947.48. In addition to that there was interest paid on mortgages on real estate, but I believe the railroad people treat that as a floating debt, not part of their regular bonded indebtedness, but they paid it amounting to $19,808.67, and they were entitled

20 to a credit for that in arriving at their surplus. Next, they were entitled to credit for the dividends they paid in arriving at the surplus of profit over dividends; consequently I credited them with the sum of $1,156,789, being five-twelfths of the dividends for the year. The dividends being a yearly matter, I was obliged to treat them in the same way which I did the rents which were received from the Schuylkill Navigation Company. I charged them five-twelfths of the latter. Add all these items together makes the sum of $3,576,563.26, to which they were entitled to credit as expenses in arriving at the surplus or profits over dividends; making that deduction leaves $1,314,997.52. Now, they paid some coupons or interest on bonded debt out of this, and the balance was of course profits or surplus. The interest or coupons was taxable at the rate of five per cent., and the surplus, whatever it might be, was taxable also at the rate of five per cent. I compute the tax on this

21 amount, at five per cent., $65,749.87, and they paid during that period tax on coupons which were paid out of this $1,314,997.52; they paid tax on coupons out of that, I say, to the amount $2,170.20, for which they were entitled to credit. Taking that amount from $65,749.87 leaves $63,579.67. That was the amount they owed, provided the renewal fund, to which I have alluded, is regarded as construction or betterment of the road, and held to be taxable. If that is allowed as expenses the amount would be reduced still further. It having been stated to be an expense, I then deducted five-twelfths of the renewal fund for the year, this being five months, upon the same theory of computation being followed, and this was $156,809.27. Five per cent. for that period amounted to $7,840.46; deducting that from $63,579.67 leaves $55,739.21, the amount actually due and unpaid on taxes or surplus or profits over dividends for the five months ending November 30th, 1864.

22 Q. The next year, 1865, from the 30th November, 1864, to the 30th November, 1865, is made up in the same way, is it not?

A. Yes, sir.

Q. The explanation you have given will apply to all of them?

A. Yes, sir; only it was not necessary to prorate any receipts or expenses for the period of the entire year.

Q. Now, for the year ending November 30th, 1866, you say the same?

A. It was made up in the same way.

Q. But not necessary to prorate?

A. Not necessary to prorate, the period being for the entire year.

Mr. VALENTINE. Now, if your honor please, we will go into the year 1867, where certain credits are allowed; that is what I am going to call the witness's attention to; I have gone to 1867, on the next page.

WITNESS. I pursued the same course for 1865, and I pursued the same course for 1866, and, if your honor will allow me, you will observe that they were entitled, in 1865, to credit for tax interest on bonds. In 1865 they were entitled to receive credit for $14,566.80 thus paid, and also they paid $106,467.96 as tax on surplus.

23 By Mr. VALENTINE:

Q. Now, what did you say about the year ending November, 1866?

A. They paid $57,686.12 as taxes on surplus for the year 1866, reducing what we claim now to $20,401.40 more than it was in 1865, but less than 1864, when they paid nothing on surplus.

Q. Now, Mr. Plummer, coming to the year ending November 30th, 1867, what was the amount of tax due for that year?

A. The amount of taxes were overpaid.

Q. I am not asking you for payments; that was due?

A. Due on what?

Q. For that year—the same as the other year.

A. If there had been no payment, the amount due would have been $39,302.24, less the amount paid on interest on bonds, $19,264.25—about $20,000.

Q. Now just give us the figures.

A. $20,037.99.

24 Q. The court wish to have it for that year just the same as for the other years; I want you to give it in that way; then I wanted you afterwards to take up and explain this matter of payment and additional payment for that year.

A. This $20,037.99 is what they would have owed if they had not been credited with the renewal fund, but having decided to allow them the renewal fund, as an expense, this the tax on which was $24,928.81, they had overpaid $4,390.82; that is crediting them with the renewal fund and leaving out this subsequent payment of $39,797.59.

Q. That was not paid until some time in the year afterwards?

A. No; that was not paid until then.

Q. What the court wants is, leaving out that subsequent payment, tell us how it stood at the close of the year 1867.

A. At the close of the year 1867, for the year 1867, leaving out this payment of $39,797.59, this special payment, and crediting them with

this renewal fund as an expense, in accordance with the decision
25 of the Department, they had overpaid for the year 1867 $4,890.82.

By the COURT:

Q. They had voluntarily overpaid that much; that is the way their account stood with the Government?

A. Yes, sir; for the year 1867.

Q. That is crediting them with the renewal fund?

A. With the renewal fund entirely. This credit of renewal fund is a subsequent matter in making up this account?

Q. Didn't they claim in that payment to the Government credit to the renewal fund? Did they make a payment on surplus that year to the Government voluntarily?

A. No, sir; they had paid on surplus for the preceding year, but they had made no return at the time this year.

Q. Crediting themselves with the renewal fund, did it leave any surplus due?

A. No, on the contrary, they overpaid; that is, by it made an overpayment of $4,890.82 for that year.

By Mr. VALENTINE:

26 Q. Now, Mr. Plummer, in making up this account originally, was not the claim of the United States for the renewal fund also?

A. It was.

Q. Please state how much, as near as you can, the whole amount of the claim was?

A. About $130,000.

Q. Then please state whether the deduction of the renewal fund has been allowed by calculations made by yourself, and whether this is the result in making that allowance or credit to the company?

A. This is the result of allowing the entire renewal fund as repairs or expenses.

Q. Originally that renewal fund was not allowed?

A. It was not allowed; it was treated as profit by the court.

Q. Was it allowed by the Government before this subsequent payment was made?

A. I don't know the basis of that payment; I don't know how they arrived at that sum.

Q. You say that the Government now does credit them with the renewal fund?

27 A. Yes, sir.

Q. That is, the Government treats them as exempt from this taxation?

A. Yes, sir.

Mr. VALENTINE:

Q. You don't know whether that was allowed before this payment was made or not?

A. No, sir; not having been present and not knowing how they arrived at the $39,797.59 which they paid.

Q. How did you get the figures showing what was overpaid?

A. I know that the fact that they paid at that time $39,797.59 odd dollars, but how they arrived at that, I don't know.

Q. You credited them with the amount of the renewal fund?

A. Yes, sir.

Q. And then ascertained by such credit how much they had overpaid?

A. Yes, sir.

Q. Then the credit must have been allowed at or before the time the payment was made?

A. That was not $4,890.82 apart from this special payment; this
28 special payment related not to the year 1867 alone, but to all the four years.

The COURT. I want to understand distinctly about that.

Mr. VALENTINE. In 1868 this investigation took place which resulted in a payment of $39,797.59. Now the witness states that he cannot tell just how the claim of the United States was made up on which that payment was made, but when he came to investigate the facts of this case, which was in November, 1879, he commenced making up an account, and he included in his account all that renewal fund. He charges them with the full amount of that renewal fund. This case, as your honors know, has been the subject of contention from time to time. Now, during this time the case has been pending and the renewal fund has been allowed by the authorities at Washington.

The COURT. When was this basis reached?

29 Mr. VALENTINE. Since 1879?

The COURT. Before the payment of $39,797.59?

Mr. VALENTINE. Oh, no, sir; ten years afterward.

The COURT. Whether reached before or since it is an admission that it shall be allowed?

Mr. VALENTINE. Oh, yes, sir; I am not here to claim it; I only want to get the fact of time before your honor. Mr. Plummer cannot speak in reference to the renewal fund, he only takes now the whole account as it is presented and gives credit for these $39,797.59, and it is impossible for him to state how that is to be applied.

The WITNESS. It is impossible for me to state how it is arrived at.

Examination continued by Mr. VALENTINE:

Q. The way you have done is you have given them credit for this payment of $39,797.59?

A. Certainly, for everything they paid relating to the period.

Q. But you can't tell how the $39,797.59 was made up?

A. No, sir.

30 Q. Now, Mr. Plummer, what is the gross amount, the whole amount of tax for the period commencing at the 30th of June, 1864, and ending with the 30th of November, 1867?

A. Do you refer to the net amount, crediting them with the overpayments of the year 1867?

Q. No; not yet.

A. For the three years $85,532.60; for the year 1867 an overpayment of $44,688.41, leaving a balance of $40,844.19.

Q. Now, I will ask you how you make up the two items of overpayment for 1867?

A. I stated before that apart from this special payment of $39,797.59 there was an overpayment of $4,890.82; adding this to the $39,797.59 which was paid in 1868, for these years that we are considering, it makes $44,688.41. I credit them with this special payment in the year '67, at the close of this period that I am considering.

Q. My question was whether or not in 1867, at the time this
31 tax accrued, the Department claimed that the renewal fund which you have spoken of was liable to a tax of five per cent.?

(Objected to by Mr. Gowen.)

Q. The figures that have been made up, these you have taken from the books of the Philadelphia and Reading Railroad Company?

A. Yes, sir.

Q. And they are here in response to our call?

A. Yes, sir.

Cross-examination by Mr. Gowen:

Q. The first item in your statement is total receipts, according to the books, for five months ending November, 1864?

A. Yes, sir.

Q. And the next item is apportioned. Now, as to the working expenses (except the renewal fund), they represent working expenses actually taken from the books?

A. Yes, sir.

Q. Not apportioned?

A. Not apportioned; actually taken from the books month by month.

32 Q. It excludes the renewal fund, excludes the other items of deduction in your account?

A. Yes, sir.

Q. And also excludes interest paid on funded debt, does it not?

A. Yes, sir.

Q. Now the item, State tax on dividends; is the State tax on capital stock measured according to the rate of dividend?

A. Yes, sir; I so understand it.

Q. And that is an apportionment also?

A. Five-twelfths of the amount for the whole year.

Q. Now, interest paid on bond and mortgage, that represents the actual payment ending with November 30th, 1864, upon what?

A. Well, upon mortgages, on real estate, not on bonds, but floating debt.

Q. No, on bonds; on bonds secured by mortgages on property belonging to the company?

A. It is not the mortgage loans of the company; some notes, I think, secured by mortgage on real estate.

33 Q. Now, returning to the 5th item, you have not got on your paper there the entire interest that was paid on the funded loan during the year 1864?

A. No, sir; I have the amount of tax you paid.

Q. But you have not got the items of the entire interest paid on funded debt during the year 1864?

A. No, sir.

Q. Now, the item entitled "Dividends, including United States tax," is an apportionment, is it not?

Q. That is five-twelfths of the dividends for the entire year.

Q. And it is estimated, apportioned that way, according to the different months?

A. Certainly.

Q. You have not on your figures anything to show how much of that dividend was earned during those five months?

A. My figures show that there was more than enough earned to pay the proportion of the dividend during the five months.

Q. Except what you have given you have nothing more?

34 A. No, sir.

Q. Do you know what that dividend was?

A. I do not.

Q. Do you know at what rate it was?

A. It was computed at the rate of five per cent.

Q. I mean the rate of dividend itself, not the rate of the tax?

A. I don't know.

Q. Do you know whether it was cash or stock?

A. I do not.

Q. Do you know out of what earnings it was taken—what period of time it represents?

A. I do not know what money was applied to it; I simply know that you earned during this period more than enough to pay it and leave a large surplus.

Q. You have also here dividend paid, including United States tax; please state what that was, what division of the dividend that was?

A. The total dividend for the year, including United States tax, was $2,776,293.80.

35 Q. I don't care about that; I want you, Mr. Plummer, to explain what is the meaning of the words "dividend paid, including United States tax." It also includes five-twelfths of the tax paid on that dividend, doesn't it?

A. It includes five-twelfths of the dividend that went to the stockholders, and five-twelfths the tax that went to the United States.

Q. It includes five-twelfths of the dividend tax?

A. Certainly.

Q. Deducted as an expense?

A. Certainly.

Q. And it includes also five-twelfths of the dividend actually paid to the stockholders?

A. Yes, sir.

Q. Do you know how that tax was calculated?

A. The basis of the calculation of the tax on dividend was the amount paid to the stockholders plus the Government tax.

Q. Then you assume that when this company paid the dividends

36 to the stockholders, that the sum which they actually paid was *not* the taxable dividend, the entire taxable dividend; didn't you assume that?

A. That was the practice of the Department.

Q. You assumed that when the company paid a dividend to stock-

holders and assumed payment of the Government tax, that the taxable dividend was a sum of which the actual dividend was 95 per cent.?

A. That was the method of making the computation.

Q. So that *is* charging a dividend tax you should charge a tax upon the sum of which the actual dividend was 95 per cent.?

A. I would charge the tax upon a sum of which the amount actually paid the stockholders was 95 per cent.

Q. And that is the way this tax was ascertained?

A. Was computed.

Q. And the rate paid on that dividend was five per cent.?

37 A. Five per cent.

Q. Although the law enforcing the five per cent. rate went into force on the 30th June, 1864?

A. It did.

Q. And on that date for the first time, profits that had been expended in construction or carried to account of a fund were taxed?

A. Yes, sir.

Q. And previous to that the tax had only been a dividend tax?

A. Yes, sir.

Q. Not a tax on surplus profits?

A. Yes, sir; no tax on surplus.

Q. And where they had spent the money in construction it was not taxable?

A. Not till after June 30th, 1864.

Q. Now, Mr. Plummer, we come to the paid interest on bonds under the period of June 30th, 1864, to November 30th, 1864. What item represents the actual tax paid during that period?

A. On interest on bonds.

38 Q. It represents the actual payment, taken from the books, during that time?

A. Yes, sir; from the returns.

Q. How much do you allow for the proportion of the renewal fund? What sum did you allow as the five months' proportion?

A. Five-twelfths of the renewal fund for the year.

Q. Well, the renewal fund for the year was $376,332.27?

A. Yes, sir.

Q. Do you know what the renewal fund for the last five months, apportioned according to the tonnage of the road, would have been?

A. I do not.

Q. Treating the renewal as for the whole year, you take the whole year, and take five-twelfths of it as the expense?

A. Yes, sir.

Q. Now, the next year was a full year.

A. Yes, sir.

Q. It was all subject to the tax law of 1864.

A. Yes, sir.

39 Q. And hence you have no break in the periods. I only want to ask you—you see the item there, State tax on dividends $123,797.67?

A. Yes, sir.

Q. Does that refer only to the State tax on dividends?

A. I think it includes some other phase of the State tax that didn't go into—working expenses.

Q. Didn't I give you information as to all these?

The WITNESS. There is an error in designating it, not an error in the figures.

Q. You come next to the item "interest paid on bonds and mortgages $30,946.76." That is an item for interest paid on bonds and mortgages of real estate?

A. Yes, sir.

Q. It does not include interest paid on funded loans?

A. No, sir.

Q. Dividends paid, etc., $2,170,597.20. You have the same statement to make with regard to the mode in which that was ascertained and
40 the rate of taxation as you have made in regard to the previous period?

A. Yes, sir.

Q. That is as to the mode in which a constructive dividend was ascertained?

A. Yes, sir.

Q. We come now to November 30th, 1866. You say the first item is correct according to the entries in the company's books; the second also. The third includes State taxes on coupons as well as dividend taxes. 4th. This includes interest on bonds and mortgages on real estate, as explained before, and does not include interest on funded loans?

A. Certainly. I noted in here floating debt. That is the way I have to distinguish it.

Q. When you come to the dividend actually paid to the stockholders and the taxes thereon you have the same explanation to make with regard to the mode in which the dividend was ascertained and the taxes assessed as you have made formerly?

A. Precisely.

41 Q. We come to 1867. "No. 4 represents interest on bonds and mortgages on real estate and not funded loans. No. 5 is dividend paid, including United States taxes." You have the same explanation to make about that that you have heretofore made?

A. Yes, sir.

Q. I' making an explanation, generally, for alleged arrears of taxes due corporations you deduct, as an item of expenditure or outlay, the interest paid on funded debts, do you not, generally? Is not that the way your forms are printed—blank forms which you use?

A. If I can get at it conveniently in my book I credit it in that way.

Q. The fact is that the forms that are in use in examination of the accounts require, as *as* an item of expenditure, interest bonded indebtedness to be deducted, isn't that so?

A. It is, but it is taxed below. There is a place in the blank to enter it as a credit.

42 Q. The mode which you adopted in stating this account was not to deduct any interest paid on loans, but to treat the money that went to pay the interest on loans as part of the surplus earnings of the company which was taxable, whether you called it interest, dividends, or what not?

A. To credit you with the tax which you actually paid, on the interest paid out of that.

Q. That is the way you did it?

A. Yes, sir.

Q. And the result of that would be to make the company chargeable with tax upon every dollar of interest it paid?

A. No, sir.

Q. Why not; how can you explain that? If you first ascertain the gross sum which the company has after paying its working expenses and taxes, and then you say that whether applied to interest, whether applied to dividends, or whether spent for construction, that is taxable at the
43 rate of five per cent., you make the company liable for all taxes, every dollar of interest it pays, don't you?

A. It is liable to tax on it as interest.

Q. That is not an answer. The result of your mode of statement is to make the company chargeable with whatever the tax may be upon every dollar that has been expended for interest?

A. Certainly.

Q. And if there was interest that was extempt from taxation, that exemption would not be allowed by this process?

A. Not by the way this statement is made up.

Mr. GOWEN. I think you will say that I gave you every information in my power?

The WITNESS. You gave me every facility that I desired.

Mr. VALENTINE. I understood you to say, speaking of the dividends, speaking of the last five months in 1864, you did not know whether the dividend was in cash or stock. Did you mean it in answer to Mr.
44 Gowen's question, "Didn't you know that it was stock?"

A. I know from the annual reports and books that it was stated to be stock.

Q. Mr. Valentine offers in evidence all the books of the Philadelphia and Reading Railroad Company referred to, as well as the statements and reports, and closed.

Testimony on the part of the defendants.

FRANKLIN B. GOWEN, having been duly sworn, was examined as follows:

By Mr. GOWEN:

Q. You are president of the Philadelphia and Reading Railroad Company?

A. I am; yes, sir.

Q. At the time those taxes accrued you were not the president, but became president in 1869?

A. I became president in the latter part of April, 1869.

Q. Who was your predecessor?

A. Mr. Charles E. Smith.

Q. Who was the accounting officer at that time, 1864 to 1869?
45 A. William H. Webb, the secretary of the company.

Q. He is dead?

A. Yes, sir.

Q. Who was the principal book-keeper?
A. Mr. Mason.
Q. He is dead also, is he not?
A. Yes, sir.
Q. When did you first have any official connection with the Philadelphia and Reading Railroad Company?
A. I became one of the counsel for the company in the county of Schuylkill, I suppose, about 1862, '63, or '64; not later than '64 or '65, I think.
Q. Do you remember an investigation made by the United States assessor in the year 1868, with regard to a claim for taxes alleged to be due and unpaid by the Reading Railroad Company to the United States Government?
A. I do.
Q. Did you take any part in that investigation?

A. I was counsel for the company, and had entire, and, I believe,
46 so far as counsel were concerned, exclusive control of it on behalf of the company in the year 1868.

Q. Do you remember how long that examination lasted?
A. I cannot without referring to a memorandum.
Mr. VALENTINE. I object to this line of examination as immaterial. It is already in evidence that the sum of $39,797.59 was paid. I understand the object of this to be to prove that that payment is a bar to any subsequent suit going over the same ground which was then gone over or to the recovery by the United States of any sum of money which they now claim to be due. I object on the ground that it is entirely immaterial. It has been repeatedly ruled that an ascertainment and an assessment for a sum of money claimed to be due by the United States is no bar to a subsequent suit for an additional amount which might have been, but was not, included in the assessment at the time it was made.

47 Q. (Mr. GOWAN to the witness.) What is your recollection of the examination, how long it took, and what its character was?
A. It was a claim made by the Government for several hundred thousand dollars of taxes in addition to those which had been paid for a period, commencing with July, 1864, and terminating with November 30th, 1867. My present recollection is that the amount claimed was $350,000; that is to say, the Government alleged that that amount, in addition to what had been paid, was honestly due to them; all the books of the company were opened to the officers of the Government. I appeared before the assessor and argued the case before him very fully. It occupied several weeks, I think, of investigations and arguments and office time. I made up my mind and advised my clients that they should pay nothing. Some of the accounting officers of the company who took the
48 statement as made by the officers representing the Government, basing it upon their own stating, showed an indebtedness, I think, of about $11,000, but I have a very distinct recollection that I advised against the payment of any money, being firmly convinced that the company had paid very much more than was due, owing to the peculiar way in which the accounts had been kept. I claimed that the company would have been entitled to very considerable credit for items of construction charged to income which they refused to permit us to charge to income in making up the tax settlements, although the company had charged them

all to income. The Government alleges that it was all for new work, and I thought that upon examination a very large amount of it might properly have been a charge to income. However, the officers of the company, with the assessor, agreed upon a settlement of the account for the
49 sum of about $39,000. I remember it very well. That was the settlement and adjustment of this whole difficulty. That sum was paid and a receipt given for it. The amount, as I find by reference to a memorandum which I made recently in looking at the papers, was $39,797.61. That sum of money was paid as a settlement of a claim which in the inception was several hundred thousand dollars; I think some $350,000, or probably more.

Q. When did you first hear of any claim on the part of the Government after that?

A. Not for many, many years afterwards. I never heard of any claim by the Government until this proceeding was commenced. I was indirectly threatened with such claim by Mr. Howard, who had, many, many years ago, represented the Government in this investigation of which I have now been speaking.

Q. When did you hear of this claim?

A. If you will permit me to refer to my correspondence, I can
50 tell you that. In May, 1879, I received a letter from Mr. Howard, which I considered as a threat of making a claim against the company. How long after that the suit was brought I don't know; this settlement took place in 1868.

Cross-examination by Mr. VALENTINE:

Q. You have the letter there?

A. I have a copy of the letter.

Q. Did Mr. Howard hold any official position at that time, if you know, in reference to the Government. I mean in 1879.

A. I don't know; I didn't know that he did.

Q. You say that you have the copy of the letter there?

A. Yes, sir.

Q. It does not indicate, does it, that he was in any official position?

A. No, he makes inquiries about an old settlement of the case in 1868. He signs his name William Howard.

Q. (Judge BUTLER.) Who was William Howard in 1868?

51 A. In 1868 he represented the United States Government as a person investigating the accounts of corporations. He made an examination of the books of the company.

Q. In 1879 he was not an officer of the Government?

A. Not that I know of. I don't really know; I had lost sight of him for a long time.

Q. (Mr. VALENTINE.) Do you know whether he was in 1868?

A. In 1868 I had very frequent intercourse with him representing the Government. I was then living in Philadelphia, and represented several corporations, against all of which claims were made by Mr. Howard, representing the Government. I represented the Catawissa road and the Delaware and Chesapeake Canal Company, and I think one or two others. At the same time there seems to have been a general claim made against almost all the corporations that I represented for back taxes in excess of what they had paid.

52 Q. Do you know whether he really occupied any official position or whether he claimed to be simply an expert making investigations?

A. He certainly claimed that he represented the Government, or we would never have permitted him to have access to the books of the company.

Q. You did permit him to have access to the company's books in 1868?

A. I am quite sure that all the facilities of the company were given him. He made a thorough examination, and made as the result of that examination a statement of the claim of the Government, which, I think, was $350,000. It was subsequently settled for the amount I have stated.

Q. This sum of $39,797.59 wasn't made up by you, as I understand it?

A. No, sir.

Q. You know nothing about it?

53 A. I don't think I had anything to do with that. It was the sum that was agreed to be taken by the Government in settlement of this difficulty after several meetings that took place before the officers of the Government. I don't know whether it was the assessor or collector, but it was regular officer of the Government. I went to his office; had several meetings; testimony was taken, and argument was made. After that full examination that was the sum which the officers of the company and the officers of the Government together agreed should be paid in settlement of this claim.

Q. You have said that it was agreed to be taken by the Government. What particular officers do you mean, the assessors?

A. The assessors—or the assessor, I think it was.

Q. Who was the assessor at the time, that you had intercourse with and that you saw?

A. I think it was Mr. Frazier or Mr. Ashworth. I can't remember. It must have been Mr. Frazier. He had his office, I think, in Fourth or Third street. It is a very long time ago, and it is only within the last few days that my attention has been particularly attracted to the case. I think it was Mr. John W. Frazier. I am quite confident it was.

54 Q. He was the person you think you saw?

A. Yes, sir; it was the assessor of the Government in that district, whoever it was.

Q. And Mr. Howard?

A. Mr. Howard represented the claim of the Government. He was the investigator; he made the claim on behalf of the Government.

Q. Do you know whether this went down on any regular list then; on what is called the assessor's list?

A. I only infer that from the fact of the statement on that receipt indicating it.

Q. Other than that you don't know?

A. I advised the company strongly against paying anything, according to my recollection.

Q. As it appears by the receipt you have no doubt that it went on the regular list?

A. I don't know anything at all about it; I only infer from that. It was not a regular assessment at all; it was not the regular

55 semi-annual or annual assessment of the company. This was a

sum that, it was claimed, the company had failed to pay or account for. It was claimed by the Government against the company, in addition to what has been paid or admitted, to be due.

Q. It appears by the receipt that it was on the June list?

A. Well, yes, sir; but I have no further knowledge of that.

Q. Did you ever see the Commissioner of Internal Revenue in regard to that?

A. I have no recollection of doing so.

Q. Nor the Secretary of the Treasury?

A. I never did.

Q. Nor the Attorney-General?

A. Never; I have no such recollection; I don't think it came before them?

Q. So far as you know the settlement was made as you have stated?

A. Yes, sir; in Philadelphia. I didn't make the settlement; I advised against any settlement. It was made between the then officers of the Government and the officers of the company in Philadelphia.

56 *Receipt offered in evidence by the defendants.*

No. 7.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE,
District of Pennsylvania, July 28, 1868.

Received of Philad'a & Reading R. R. Co. forty-one thousand eight hundred & seven $\frac{61}{100}$ dollars, for excise tax on—

Gross receipts	$2,010 00
Profits on dividends	39,797 61
Total	41,807 61

May, 1868, being amount assessed on June list for July 1st, '64, to Nov. 30, 1867.

JOSEPH G. KLINE,
Deputy Collector.

$41,807.61.
United States tax per July 28, '68, C. B. 349.

And thereupon the learned court charged the jury as follows:

In the year 1868 the plaintiff, the Government of the United States, made claim against the defendant, the Phila. & Reading R. R.
57 Company, for a large sum of money, alleged to be due on account of unpaid taxes on surplus earnings of said company over dividends declared between the 30th day of June, 1864, and the 30th day of November, 1867. The justice of this claim was at first denied by the company, and payment refused. After considerable controversy and careful examination of the subject, the internal revenue assessor, whose duty it was to ascertain the amount and assess the same against the defendant, fixed it at a little less than $40,000. In this act of the assessor the defendant acquiesced and paid the sum assessed. The matter so rested until 1880, when another claim was preferred by the Government for the unpaid taxes on surplus

earnings between the same periods, on the ground that the assessment of 1868 was too low, this last claim being for an additional sum of about $40,000. The suit we are trying is brought to recover this claim, should it be sustained. From the assessment made by the Government's
58 officer in 1868, the payment of the money in pursuance of it, and the acquiescence of the Government in what was thus done for so long a period—nearly twelve years—a presumption arises that the assessment then made was correct, and that the money paid covered the defendant's entire liability for taxes upon surplus earnings between the periods embraced. The burden is thus cast upon the plaintiff to repel the presumption by evidence that the assessment was erroneous, and in view of the circumstances, the evidence should be such as to satisfy the mind fully in this respect. The only evidence of error which has been produced is to be found in the fact that a witness, Mr. Plummer, testifies that upon a recent examination of the books and papers of the defendant and a calculation based upon the entries and statements therein contained, he finds the defendant to have been indebted for taxes on surplus earnings at the time of said assessment in the further sum here claimed.

59 Does the testimony of this witness satisfy your minds that the assessment of 1868 was erroneous? You heard the examination of the witness and his explanation of the manner in which he reached the conclusion stated. You heard from the testimony of Mr. Gowen the circumstances attending the assessment in 1868. The claim as first presented appears at the outset to have been greater even than Mr. Plummer's estimate would make it. The subject at that time seems to have received the fullest and most careful attention. The Government was represented by a detective and expert, as well as by its assessor, and after examination of the defendant's books and papers, and conference with the defendant's officers, familiar with the transactions involved, the amount due was ascertained by the Government's representative, and declared to be the sum then assessed and paid. What is there to justify a belief that the investigation made recently by Mr. Plummer, in the manner
60 and with the opportunities has *has* detailed, is more likely to be correct than the careful, laborious, and protracted investigation made in 1868, when the transaction inquired into were comparatively recent and fresh? I repeat, unless you are satisfied that the assessment of 1868 was erroneous it must stand. The Government, to relieve itself from the presumption arising out of the assessment and the payment of the money under it without complaint or suggestion of error for a period of nearly twelve years, must prove mistake or fail in her suit. Whether she has proved mistake by the testimony of the witness referred to (there is no other testimony tending to prove it) is for you to determine. In submitting this question, however, it is proper to say, that in the judgment of the court, it would be unsafe and therefore unjust to find error in the assessment and settlement under the evidence before you, and conse-
61 quently to render a verdict against the defendant for the large sum of money claimed, as the plaintiff asks you to do. In other words, while the court does not desire to control your finding, but submits the question to you, it is of opinion that you should not, under the circumstances, find for the plaintiff.

And thereupon the counsel for the plaintiff excepted to the following parts of the charge of the court:

"The suit we are trying is brought to recover this claim ($40,000) should it be sustained. From the assessment made by the Government officer in 1868, the payment of the money in pursuance of it and the acquiescence of the Government in what was thus done for so long a period, nearly 12 years, a presumption arises that the assessment then made was correct, and the money paid covered the defendants' entire liability for taxes upon surplus earnings, between the periods embraced. The burden is thus
62 cast upon the plaintiffs to repel the presumption by evidence that the assessment was erroneous, and in view of the circumstances the evidence should be such as to satisfy the mind fully in this respect. The only evidence of error which has been produced is to be found in the fact that a witness, Mr. Plummer, testifies that upon a recent examination of the books and papers of the defendants, and a calculation based upon the entries and statements therein contained, he finds the defendants to have been indebted for taxes on surplus earnings at the time of said assessment in the further sum here claimed." * * *

"The amount due was ascertained by the Government's representative and declared to be the sum then assessed and paid. What is there to justify a belief that the investigation made recently by Mr. Plummer, in the manner and with the opportunities he has detailed, is more likely to be correct than the careful, laborious, and protracted investigation made in
63 1868, when the transactions inquired into were comparatively recent and fresh? I repeat, unless you are satified that the assessment of 1868 was erroneous, it must stand. The Government, to relieve itself from the presumption arising out of the assessment and the payment of the money under it, without complaint or suggestion of error for a period of nearly 12 years, must prove mistake or or fail in her suit. Whether she has proved mistake by the testimony of the witness referrred to (there is no other testimony tending to prove it) is for you to determine. In submitting the question, however, it is proper to say that, in the judgment of the court, it would be unsafe and therefore unjust to find error in the assessment and settlement under the evidence before you, and consequently to render a verdict against the defendant for the large sum of money claimed, as the plaintiff asks you to do.
64 In other words, while the court does not desire to control your finding, but submits the question to you, it is of opinion that you should not under the circumstances find for the plaintiff."

And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record, the said counsel for the said plaintiff did then and there tender this bill of exceptions to the charge and opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 12 day of April, A. D. 1883.

WM. BUTLER. [SEAL.]

65 In the district court of the United States for the eastern district of Pennsylvania, of February sessions, 1880, No. 126.

UNITED STATES OF AMERICA
vs.
THE PHILADELPHIA AND READING RAILROAD Company.

Assignments of error.

Sur writ of error on the part of the plaintiff.

Because the learned judge erred in charging the jury as follows:

"The suit we are trying is brought to recover this claim ($40,000) should it be sustained. From the assessment made by the Government officer in 1868, the payment of the money in pursuance of it, and the acquiesence of the Government in what was thus done for so long a period, nearly 12 years, a presumption arises that the assessment then made was correct, and the money paid covered the defendants'
66 entire liability for taxes upon surplus earnings between the periods embraced. The burden is thus cast upon the plaintiff to repel the presumption by evidence that the assessment was erroneous, and in view of the circumstances the evidence should be such as to satisfy the mind fully in this respect. The only evidence of error which has been produced is to be found in the fact that a witness, Mr. Plummer, testifies that upon a recent examination of the books and papers of the defendants, and a calculation based upon the entries and statements therein contained, he finds the defendants to have been indebted for taxes on surplus earnings at the time of said assessment in the further sum here claimed." * * *

"The amount due was ascertained by the Government's representative and declared to be the sum then assessed and paid. What is there to justify a belief that the investigation made recently by Mr. Plummer,
67 in the manner and with the opportunities he has detailed, is more likely to be correct than the careful, laborious, and protracted investigation made in 1868, when the transactions enquired into were comparatively recent and fresh?" I repeat, unless you are satisfied that the assessment of 1868 was erroneous, it must stand. The Government, to relieve itself from the presumption arising out of the assessment, the payment of the money under it, without complaint or suggestion of error, for a period of nearly 12 years, must prove mistake or fail in her suit. Whether she has proved mistake by the testimony of the witness referred to (there is no other testimony tending to prove it) it is for you to determine. In submitting the question, however, it is proper to say that, in the judgment of the court, it would be unsafe and therefore unjust to find error in the assessment and settlement under the evidence before you,
68 and consequently to render a verdict against the defendant for the large sum sum of money claimed, as the plaintiff asks you to do. In other words, while the court does not desire to control your finding, but submits the question to you, it is of opinion that you should not under the circumstances find for the plaintiff."

And the plaintiff in error prays that the judgment entered on the verdict in this case be reversed.

JOHN K. VALENTINE,
Attorney for Pl'ff.

69 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the record and proceedings in the said court, in a certain action of summons case therein lately depending, wherein the United States of America are the plaintiffs and the Philadelphia and Reading Railroad Company are the defendants, as full and entire as the same now remain of record in said court.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court this fifteenth day of June, A. D. 1883, and in the one hundred & seventh year of the Independence of the said United States.

[SEAL.] W. W. CRAIG,
Pro Clerk Dist. Ct. U. States.

70 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

The President of the United States to the judge of the district court of the United States for the eastern district of Pennsylvania, greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between the United States of America, plaintiff, and the Philadelphia and Reading Railroad Company, defendant, in a plea of trespass on the case, a manifest error has intervened to the great damage of the said the United States of America, as in its complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your
71 seal you do distinctly and openly send the record and process in the suit aforesaid with all things concerning them and this writ, so that you have the same before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit, sitting at Philadelphia, in the State of Pennsylvania, on the first Monday of October, next (1883), that the record and process aforesaid being inspected they may cause to be done there'pon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this seventh day of May, in the year of our Lord one thousand eight hundred and eighty-three, and in the one hundred and seventh year of the Independence of the said United States.

(Signed) SAMUEL BELL,
[SEAL.] *Clerk Circuit Court U. S. East. Dist. of Penn'a.*

72 (Endorsed:) No. 2, October sess., 1863. C. C. U. S., E. D. of Pa. The United States of America, plaintiff in error, vs. The Philadelphia and Reading Railroad Co., defendant in error. Writ of error. Brought into the clerk's office, district court U. States, by the dist. att'y for the United States, plaintiff, on May 8, 1883. C. S. Lincoln, cl'k dist. court.

73 THE UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

To the Philadelphia and Reading Railroad Company, greeting:

You are hereby cited and admonished to be an' appear at circuit court of the United States for the eastern district of Pennsylvania, to be holden at Philadelphia on the first Monday of October next (1883), pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this eighth day of May, A. D. 1883.

WM. BUTLER,
Judge.

74 (Endorsed:) No. 126, Feb'y sess., 1880. No. 2, October sess., 1883. C. C. U. S., E. D. of Pa. The United States of America, pl'ff in error, vs. The Philad'a and Reading R. R. Co., def'd in error. Citation. Brought into the office of the clerk of the district court June 7, 1883. I accept service of the within citation for and on behalf of the Phila. & Reading Railroad Company. James E. Gowen.

75 (Endorsed:) No. 2, Oct. sess., 1883. Circuit court U. States, E. dist. of Penn. The United States vs. The Philadelphia and Reading Railroad Company. Record of district court and writ of error with citation. Filed June 18, 1883.

76 And afterwards, to wit, on the 21st day of January, A. D. 1884, this cause came on to be heard upon the record of the district court of the United States for the eastern district of Pennsylvania, and having been argued by the counsel for the respective parties, the court entered the following decree:

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE PHILADELPHIA AND READING RAILROAD Company, defendant in error.

And now, January 21st, 1884, the judgment of the district court is affirmed.

BY THE COURT.

77 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of the United States of America, plaintiff in error, vs. The Philadelphia and Reading Railroad Company, defend-

ant in error, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia this fifteenth day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of these United States the one hundred and ninth.

[SEAL.] SAMUEL BELL,
Clerk o' C. C.

(Indorsement on cover:) No. 273. The United States, plaintiff in error, vs. The Philadelphia & Reading Railroad Company. E. Pennsylvania C. C. U. S. Filed August 4th, 1884.

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JAMES. H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE PHILADELPHIA AND READING RAILROAD COMPANY. } No. 30.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF THE CASE.

On the 4th day of March, 1880, the United States brought suit, which was sanctioned by the Commissioner of Internal Revenue, against the Philadelphia and Reading Railroad Company in the circuit court of the United States for the eastern district of Pennsylvania to recover a balance of $40,844.19, which it is alleged the company owes on account of taxes on undivided profits, which was not paid, and which accrued between the 30th of June, 1864, and the 30th of November, 1867.

The action is in case upon promises.

The declaration is in the common counts, with one spe-

cial count for interest and two for taxes in different amounts.

The plea is "non assumpsit payment and set-off with leave, &c."

The evidence on part of the plaintiff proved that, by the defendant's own books, after deducting all payments, there was a balance due and unpaid from the defendant of $85,532.60 on the 30th of November, 1867. (Rec., 10, 11.) On this amount the defendant was in 1868 entitled to a credit of $44,688.41, consisting of $39,797.61, paid July 28, 1868, and an overpayment of $4,890.82 for the year 1867. As a bar to the payment of the balance unpaid, the defendant called a witness to prove that before the payment in 1868 an agent of the Government had investigated the accounts of the corporation and the payment of $39,797.61 was the amount found by the agent to be due, which was paid and receipt given therefor. The receipt was given in evidence, as is shown by the record, page 19.

The charge of the court as to the effect of the investigation and receipt was excepted to and constitutes the error assigned. The verdict of the jury was for the defendant.

SPECIFICATION OF ERROR.

The court erred in charging the jury as follows:

> The suit we are trying is brought to recover this claim ($40,000). Should it be sustained? From the assessment made by the Government officer in 1868, the payment of the money in pursuance of it, and the acquiescence of the Government in what was thus

done for so long a period, nearly twelve years, a presumption arises that the assessment then made was correct, and the money paid covered the defendants' *entire liability* for taxes upon surplus earnings between the periods embraced. The burden is thus cast upon the plaintiff to repel the presumption by evidence that the assessment was erroneous, and in view of the circumstances the evidence should be such as to satisfy the mind fully in this respect. The only evidence of error which has been produced is to be found in the fact that a witness, Mr. Plummer, testifies that upon a recent examination of the books and papers of the defendants, and a calculation based upon the entries and statements therein contained, he finds the defendants to have been indebted for taxes on surplus earnings at the time of said assessment in the further sum here claimed. * * *

The amount due was ascertained by the Government's representative and declared to be the sum then assessed and paid. What is there to justify a belief that the investigation made recently by Mr. Plummer, in the manner and with the opportunities he has detailed, is more likely to be correct than the careful, laborious, and protracted investigation made in 1868, when the transactions inquired into were comparatively recent and fresh?" I repeat, unless you are satisfied that the assessment of 1868 was erroneous, it must stand. The Government, to relieve itself from the presumption arising out of the assessment, the payment of the money under it, without complaint or suggestion of error, for a period of nearly 12 years, must prove mistake or fail in her suit. Whether she has proved mistake by the testimony of the witness referred to (there is no other testimony tending to prove it) it is for you to determine. In submitting the question, however, it is proper to say that, in the judgment of the court, it

would be unsafe and therefore unjust to find error in the assessment and settlement under the evidence before you, and consequently to render a verdict against the defendant for the large sum of money claimed, as the plaintiff asks you to do. In other words, while the court does not desire to control your finding, but submits the question to you, it is of opinion that you should not under the circumstances find for the plaintiff.

BRIEF OF ARGUMENT.

The tax sued for accrued under section 122 of the *Act of the 30th of June*, 1864 (13 Stat. L., 284), as amended by the *Act of the 13th of July*, 1866 (14 Stat. L., 138), which provides:

> That section one hundred and twenty-two be amended by striking out all after the enacting clause and inserting in lieu thereof the following: That any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in script or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, *and all profits of such company carried to the account of any fund, or used for construction*, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable,

including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal.

That section one hundred and twenty-two be further amended by adding thereto the following proviso: *Provided,* That whenever any of the compa-

nies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, *that* in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness.

Section 3213, Revised Statutes, which is a re-enactment of a part of the *Act of the 13th of July*, 1866 (14 Stat. L., 111), authorizes the collection of the taxes under this act by suit in any proper form of action.

The case of *The Savings Bank* v. *U. S.* (19 Wallace, 227–240), rules that on general principles, as well as the statute, an action can be maintained to collect the tax, and "that no other assessment, than that made by the statute is necessary to determine the extent of the liabilty under the act."

The tax sued for in the case cited was against a bank, under section 120 of the same act. The principle applies with equal force to this case, as the statutory provisions applicable to each are substantially identical.

The principles stated in the Savings Bank Case are elaborated, applied, and supported by authorities in the case of *The United States* v. *Tilden* (9 Benedict, 368–394). It seems to be well settled that the assessment of the tax is not conclusive on either the United States, the citizens, or corporation. In this case it was proven on part of the plaintiff by Mr. Plummer, a revenue agent, that in 1879 he examined the books of the corporation; that he took accurate statements from the books. The books were also produced and offered on the trial to test the accuracy of his statements and results. In order to ascertain the surplus or profits over dividends, the credits allowed, and how the

surplus was obtained is fully stated in the testimony as printed in the record, page 7. Every possible proper credit was allowed the defendant in the statement. That the books were correct the defendant did not dispute; that any credit was omitted that should have been allowed was not alleged. The result, with these elements established, was an indisputable conclusion of an exact science.

The same precision was reached by the same process for each year. The balance of $40,844.19, in favor of the Government, was fixed from indisputed facts upon mathematical principles. (R. P., 10.)

On part of the Government it was absolutely proven that the defendant owed that amount, which has not been paid. In reply to this the defendant proved by Mr. Gowen, who in 1868 had been counsel for the road, that an agent for the Government in 1868 had claimed about 350,000 as due the Government; had had full access to the books of the company, and that the subject had been under examination several weeks, after which the officers of the company, with the assessor, "agreed upon a settlement of the account for the sum of about $39,000." (R. P., 17.) The witness who testified to this gives no account of how this balance was reached or what was included in the settlement, and disposes of the whole affair by the statement: "That was the settlement and adjustment of the whole difficulty." (R. P., 17.) At that time the witness was not an officer of the company. It is not stated he personally examined the books, or joined the officer of the Government in the examination; nor even that he was ever present when the examination of the books was made. The fact that he proves the death of

the book-keeper and secretary of the company would imply that they and not he were conversant with the facts considered in the settlement; but at the close of the settlement a receipt was given (R. P., 19), as follows:

No. 7.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE,
District of Pennsylvania, July 28, 1868.

Received of Philad'a & Reading R. R. Co. forty-one thousand eight hundred and seven $\frac{61}{100}$ dollars, for excise tax on—

Gross receipts	$2,010 00
Profits on dividends	39,797 61
Total	41,807 61

May, 1868, being amount assessed on June list for July 1st, 1864, to Nov. 30, 1867.

JOSEPH G. KLINE,
Deputy Collector.

$41,807.61, United States tax per July 28, '68, C. B. 349.

This receipt states specifically what the money was paid for and what the alleged settlement embraced. It shows that only "gross receipts and profits on dividends" were what was considered and passed upon, and nothing else. The money sued for in this case is embraced in neither of these items. This action is for the tax on the undivided net profits described in the law by the clause "and all profits of such company carried to the account of any fund, or used for construction." This is outside of profits on dividends, which are elsewhere referred to in the same section, and which, in making up plaintiff's claim in this case, were excluded (R. P., 7).

The gross receipts were taxable at the rate of $2\frac{1}{2}$ per cent., under section 103. (14 Stat. L., 135; also 13 Stat. L., 275.)

The evidence, when analyzed, shows affirmatively the tax now claimed by the Government was not included in the alleged settlement.

The charge of the court assigned for error is in substance a binding instruction to find for the defendant. It is erroneous on several different grounds. The charge is presumed to be made concerning the evidence offered. For in any case the law applicable to the case arises from the facts.

The court, in the first clause of the assignment, announces that an assessment was made in 1868 and the money paid, "in pursuance of it, and the acquiescence of the Government in what was thus done for so long a period, nearly twelve years, a presumption arises that the assessment then made was correct, and that the money paid covered the defendant's *entire liability for taxes upon surplus earnings* for the periods embraced." The evidence shows that the transaction in 1868 was rather a settlement or compromise between the officers of the company and some agent of the Government than an assessment according to law. If it was a settlement or compromise, no officer, without the approval of the Secretary of the Treasury, could make it lawfully. The evidence shows affirmatively that the surplus undivided profits were not included. There was no room left for the presumption announced by the court to the jury that *all liability* was discharged thereby. The court, in the next clause, invites the jury to test the probabilities of the correctness of the

testimony before them by the former investigation, which was not before them. It was leaving it to the jury to pass upon the facts by a comparison with conjecture. Conjecture is a dangerous element thrown into a jury box. When a court instructs a jury that this element is sufficient to overcome proven or undisputed facts, it is error.

The court instructed the jury that the burden of proof was on the Government to prove mistake in the alleged settlement. The burden of proof in the first instance was on the Government to prove the defendant owed the tax. This was unmistakably done. Then the burden shifted and it behooved the defendant to assume the burden of proof to show the debt paid or discharged. Till this was done by the defendant the burden of proof did not change. The defendant, even if the settlement was proven, must go further and show the subject-matter of this suit was embraced in it. "A settled account is only *prima facie* evidence in law of its correctness. It concludes nothing as to items not stated in it." (*Perkins* v. *Hart*, 11 Wheaton, 237–256.)

The conclusion of the sentence assigned for error is as follows:

> In submitting the question, however, it is proper to say that, in the judgment of the court, it would be unsafe, and, therefore unjust, to find error in the assessment and settlement under the evidence before you, and consequently to render a verdict against the defendant for the large sum of money claimed, as the plaintiff asks you to do.

This is a submission of the case to the jury in form, but a withdrawal in substance. In the administration of justice the law prefers substance to form. The court is

presumed to be bearing testimony to the jury as to the law of the case. The jury are required to accept that testimony as conclusive. The court, in the sentence quoted, says in substance to the jury—it is unjust to find for the plaintiff. As the jury are bound to assume the court accepts the law as the measure of justice, to them this sentence is equivalent to the statement that under the evidence it is unlawful to find for the plaintiff. The instruction is, therefore, imperative. If there was any substantial evidence to sustain the issue on part of the plaintiff, it should have been submitted to the jury. (*Otis* v. *Watkins*, 9 *Cranch*, 359, 387; *Bergner* v. *Thompson*, 74 *Pa. State*, 172.) When parol evidence alone is relied upon, although the testimony of the witness is uncontradicted and decisive of the case, if true, the court cannot lawfully decide upon the credibility of the witness and should submit the case to the jury. (*Madora* v. *Eversole*, 62 *Pa. State*, 160–165.) In this case it was shown from the defendant's own books unmistakably that the tax was due and unpaid; that every credit claimed and payment made by defendant was allowed; hence, even if the very subject of this suit had been embraced in the former statement, it afforded ample evidence of mistake to submit to the jury; for if the facts proven show, as they do, an indebtedness, and the former alleged settlement shows there was not, there must have been a mistake in the alleged settlement, or the evidence now adduced was not true. This last conclusion the court drew, instead of submitting it to the jury, and erred therein.

G. A. JENKS,
Solicitor-General.

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123-13

OCT 13 1887
JAMES H. MCKENNEY

No. 30. October Term, 1887.

IN THE

Supreme Court of the United States.

The United States,
Plaintiff in Error,

vs.

The Philadelphia and Reading Railroad Company,
Defendant in Error.

Error to United States Circuit Court for the Eastern District of Pennsylvania.

Paper-Book of Defendant in Error.

THOMAS HART, JR.,
WILLIAM WARD,
GEO. R. KAERCHER.

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

In the Supreme Court of the United States.

No. 30. October Term, 1887.

The United States, Plaintiff in Error,

vs.

The Philadelphia and Reading Railroad Company, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PAPER-BOOK OF THE DEFENDANT IN ERROR.

I. COUNTER-STATEMENT.

In the year 1868 the United States made a demand against the Philadelphia and Reading Railroad Company for some $350,000, which it claimed the company owed it for taxes upon undivided profits alleged to be due, in addition to taxes theretofore paid, for a period commencing with July, 1864, and terminating with November 30th, 1867. A duly authorized agent of the Government had made an examination of

the books of the company, which were freely thrown open to him, and had made a report that the company owed this large amount of money. The company denied its liability for any amount, or at least for so much, claiming large credits for items of construction as properly charged to income and therefore diminishing the surplus profits. The matter came before John W. Frazer, the assessor, and was the subject of investigation by and of testimony and argument before him, which consumed weeks of time. The matter was concluded by the assessor adopting a statement of the profits over dividends liable to tax, resulting in the finding of the sum of $39,797.61 due the United States upon this account. This amount was paid in July, 1868, and the receipt given in evidence was received by the railroad company.

It is to be stated here, what is however obvious, that there is an error in the printing of the receipt in the record. Instead of "Profits *on* dividends, $39,797.61," it should be, as the original reads, "Profits *over* dividends $39,797.61." The statement therefore made (page 8 of paper-book of plaintiff in error), that the receipt itself shows that the money sued for in this case was embraced in neither of the items of the receipt, is erroneous. The claim made against the company in 1868 was unquestionably for the very same tax on the company's undivided net profits, or, as stated in the amended act of 1866, "on all profits of such company carried to the account of any fund or used for construction," and, as stated in the receipt, on "profits *over* dividends," which was demanded in this case.

The claim made in 1868 included everything in the shape of undivided profits—*all* profits *over* dividends. There is not a pretense therefore for the assertion made in the paper-book of the Solicitor-General (pages 8 and 9), that the present claim is outside of the tax which was fixed and paid in 1868, and that the evidence shows that the surplus undivided profits were not included therein. They certainly were. As the learned judge stated in his charge (original, page 58, record), "the money paid (in 1868) covered the defendant's *entire liability* for taxes upon surplus earnings between the periods embraced."

Another fact is indisputable. The settlement in 1868 was not in any sense a compromise. It was a finding by the assessor of the amount of surplus profits upon which the tax was due. It was a new or additional assessment of the tax on undivided profits, which after all this investigation, one covering more time, and made the subject of more contention than that instituted by Mr. Plummer some eleven years afterwards, was fixed at a certain and definite figure. The statement in the receipt is quite conclusive as to the character of this settlement, namely, " May, 1868, being amount *assessed* on June list for July 1st, 1864, to November 30th, 1867."

There is just as little doubt that there was an assessment made by the proper officer in 1868, of what he then found to be the taxable undivided net profits, as that that tax was paid and that it was a claim for and assessment of the very same tax as was claimed in this suit.

It is not of course necessary here to go into any examination of Mr. Plummer's testimony. He made his examination eleven years after Mr. Howard had done so, and simply arrived at a different result. In doing this he had to and did determine a number of disputed questions.

These were among others the proper mode of arriving at the amount to be paid for the part of the year 1864 between July and December, for undivided profits were not taxed before the law of 1864 (record, page 11); the proper amount to be deducted as dividends paid, that is whether the tax thereon was a part of the dividend or not (page 3, record), and the question about the deduction of interest on funded loans (pages 14 and 15, record).

It is not therefore accurate to say as the Solicitor-General does (page 7), that Plummer's result was an indisputable conclusion of an exact science and that the balance of $40,844.19, claimed in favor of the Government, was fixed from undisputed facts upon mathematical principles. Mr. Plummer's figures assumed certain positions which were not conceded and which must have been some of the points of contention in 1868, when the defendant submitted the whole subject had been examined and determined.

BRIEF OF ARGUMENT.

The single error assigned is to the charge of the court, that it did not properly submit the case to the jury, and that it was in effect a binding instruction to find for the defendant.

What was the question for the jury? Simply the effect of the assessment of 1868, and payment of the tax then found to be due.

It was an assessment duly made of the same tax for the same period upon the same subject as that claimed in this suit.

A considerable part of the argument of the learned Solicitor-General is devoted to the proposition that the settlement and payment in 1868 and the claim made in this suit were for different things, but this has been shown to be erroneous. What error then was there in the court instructing the jury, "From the assessment made by the Government's officer in 1868, the payment of the money in pursuance of it, and the acquiescence of the Government in what was thus due for so long a period—nearly twelve years—a presumption arises that the assessment then made was correct, and that the money paid covered the defendant's entire liability for taxes upon surplus earnings between the periods embraced? The burden is thus cast upon the plaintiff to reject the presumption by evidence that the assessment was erroneous," &c.

Now it was conceded that the assessment of 1868 was not conclusive; that it was not a bar to this suit; but was it not sufficient to cast upon the Government the burden of showing its error? This is the extent to which the court went upon this subject.

The court permitted the plaintiff to give evidence that the assessment of 1868 was erroneous; it said only "that the evidence should be such as to satisfy the mind fully in this respect."

This was saying as much as to the right of the Government as could be demanded. This was not, as in most cases, the first demand for taxes beyond those already paid. That was the demand in 1868. In 1879 the Government made a third de-

mand, alleging that it had not got enough, even upon the second investigation and assessment. Though the Government was not actually barred, it would be gross oppression to permit it to make repeated experiments without holding it to the burden of proof of showing former errors and to the production of clearly satisfactory evidence thereof.

The case cited from 9 Benedict, is that of the United States against S. J. Tilden. The defendant showed that he had made returns of his income for the years in question, was assessed and paid the tax assessed. The plaintiff demurred, and the question simply was whether the causes of action were barred by the facts of former assessment and payment. See page 387. The court sustained the demurrer on the ground that the former assessment was no bar to a subsequent action. The court simply held that the former assessment was not a conclusive adjudication upon the United States.

The cases of U. S. *vs.* Little Miami R. R. Co., 1 Fed. Rep., 700; U. S. *vs.* Halloran, 14 Blatch, 1; and U. S, *vs.* Hazard, 22 Int. Rev. Rec., 300, decide no more. All of them were based upon the cases of the Savings Bank, 19 Wall., 227, and Clikenbeard *vs.* U. S., 21 Wall., 65.

In the first named case there had been no former assessment. In point of fact, former commissioners of internal revenue had held that savings banks were not required to pay a tax on amounts added to their surplus or contingent funds, and therefore no returns or assessments were made. The point decided was that the taxes, which were held to be due, could be sued for and recovered in any proper form of action, without a previous assessment.

In Clikenbeard *vs.* U. S., 21 Wallace, 65, however, the Government, which was suing upon a distiller's bond, counted on an assessment which had been made against the principal, and contended that it not having been appealed from was *res adjudicata* and conclusive, and the defendant was precluded from showing the contrary. This court held that the defendant could set up the defense that the tax was illegally assessed, *that he could attack the assessment*, and that evidence which he offered to this effect should have been admitted.

This is what the court said the plaintiff had the right to do here. The United States were entitled to show that the assessment was erroneous. The question for the jury was, whether this had been done to the satisfaction of the jury.

Was the question taken from the jury?

The charge of the court, of which the part excepted to is a portion only, will be found in full at page 19 of the record. There were no requests to charge by either the plaintiff or defendant.

Nothing is better settled than that the plaintiff cannot complain of the omission of the judge below to charge in a particular manner, unless his attention was called to the matter by a special request.

Fox *vs.* Fox, 96 Penna. Stat., 60.

The learned judge gave a short but accurate statement of how the suit arose, and while he certainly had and expressed an opinion upon the evidence it cannot be pretended that he did not submit the very question in issue to the determination of the jury.

He said (original, 59), "Does the testimony of this witness (Mr. Plummer) satisfy your minds that the assessment of 1868 was erroneous?" And (original, page 60), "I repeat, *unless you are satisfied that the assessment of 1868 was erroneous* it must stand."

And again (original, 60), "The Government must prove mistake or fail in her suit. Whether she has proved mistake by the testimony of the witness referred to (there is no other testimony tending to prove it), *is for you to determine. In submitting this question*, however, it is proper to say that in the judgment of the court," &c.

And concluded (*Id.*), "In other words, *while the court does not desire to control your finding, but submits the question to you*, it is of opinion that you should not under the circumstances find for the plaintiff."

The whole of the charge must be taken together, a few sentences cannot be selected from it.

Carothers *vs.* Dunning, 3 S. & R., 373;

Reeves *vs.* R. Rd. Co., 30 Pa. Stat., 454.

There is no error if the charge taken as a whole, leaves the questions at issue fairly to the jury.

Reese *vs.* Reese, 90 Pa. Stat., 89.

It is not pretended that the charge misled the jury in any respect, and as to the expression of opinion by the court below, it is submitted that the language used was not a bit too strong for a case like this.

In a number of cases expressions of opinion, not any less decided than that in question, have been said to be not only within the province of the court, but in some cases eminently proper. See the following instances:—

The principle is well established that the court may give its opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion, in regard to the fact. A mere matter of opinion as to facts will only have such influence on the jury as they may think it entitled to.

Games *vs.* Dunn, 14 Peters, 322.

The judge may express his opinion on the subject, and in cases where the jury is liable to be influenced by their prejudices, it is well for him to do so, but it is entirely in his discretion. By Justice Bradley, citing many cases, in Insurance Co. *vs.* Rodel, 95 U. S., 238.

5 Otto, 302, Transportation Line *vs.* Hope. An expression of an opinion simply by a judge upon a question of fact is not ground of error.

It is not error for the judge to comment upon the evidence, if he does not take from the jury the right to weigh the evidence and determine the disputed facts.

104 U. S., 197, Insurance Co. *vs.* Trefz.

In Bonner *vs.* Herrick, 1 Out., 220, the court below said, as to attacking a man's character for veracity upon the heels of a hotly contested litigation, "although it is a makeweight for you (the jury) yet it would have very little effect upon me in determining the position of the parties, when there is so much evidence in the case." The Supreme Court said, "In calling their attention to the evidence, affecting the credibility of the defendant, the court commented on it with some freedom, yet

it was careful to say to them that it was all for their consideration."

In a case of an indictment for burglary and entering with intent to steal, the court said, * * "I cannot for my part see how the jury can hesitate a moment to convict the prisoner on the third count." Held, that although this was certainly a strong expression of opinion, yet taken in connection with the entire charge it did not amount to a binding expression. Johnston *vs.* Commonwealth, 4 Norris, 54.

"Very strong expressions of opinion on the facts are tolerated, indeed, sometimes may be necessary." By Agnew, J., in Bitner *vs.* Bitner, 15 P. F. Smith, 347.

In a case against the surety in an official bond, in which the sole question was whether the principal had collected the money in his official capacity, it was not error for the court, after stating the evidence, to say, "Under the circumstances we regard the defendant as having acted in the premises and collected the money in his official capacity," if the question was, indeed, referred to the jury. Ditmars *vs.* Commonwealth, 11 Wr., 335.

In Kilpatrick *vs.* Commonwealth, 7 Casey, 198, the court below said, "The court is of opinion, from its view of the case, that if the offense is not manslaughter it is murder in the first degree, as the jury believe that the act was committed in the heat of blood, or upon a sudden quarrel, or with coolness and deliberation."

Judge Srong said: "The charge of the court must be considered as a whole. It is apparent the jury was left free to find a verdict of murder in the second degree, if, in their opinion, such a verdict was warranted by the evidence. * * * It (the isolated sentence in the charge) was not a binding direction, and could not have been so understood by the jury. * * * A judge may rightfully express his opinion respecting the evidence, and it may sometimes be his duty to do it, yet not so as to withdraw it from the consideration and decision of the jury."

In Porter *vs.* Seiler, 11 Harris, 424, it was held that a case will not be reversed on account of an expression of an opinion

by the court as to which of certain witnesses are most entitled to credit, or upon evidence in the case which, however, is submitted to the jury for its decision. In that case, the judge below told the jury that they were the sole judges of the credibility and correctness of the witnesses, but that he deemed it his duty to say that Knepley's testimony was entitled to more weight, as he was an eye witness, &c.

Judge Black said, in Repsher *vs.* Watson, 5 Harris, 368, "A judge may give his opinion freely on the weight and value of evidence, for he is the best and safer adviser of the jury, but he has no authority to *decide* any questions of fact, &c."

Sailor *vs.* Hertzogg, 10 Barr, 296, was an ejectment in which the possession of the plaintiff was in issue. The judge below said: "This (his possession) is a question of fact for your consideration and decision, but I am bound to say to you that in my opinion they (the defendants) have furnished powerfully convincing, if not conclusive, proof, considered by itself, either that Sailor never had possession, or, &c."

The Supreme Court said (page 320), that in view of the circumstances of this case, the judge would, had he failed to give the jury his opinion, have been derelict of duty.

Two Pennsylvania cases are cited by the learned Solicitor-General:—

In Bergner *vs.* Thompson, 74 Penna. St., 172, the judge gave a binding instruction upon certain evidence; he did not even in form submit it to the jury. The plaintiff sued to recover money which the defendant had received upon a sale of certain property. The defendant said that he was to have all that the property brought over $13,000 for negotiating the sale, and there was evidence that there had been a sale to the defendant by certain agents of the plaintiff, and a ratification thereof. The court below, however, charged that the defendant could not claim the property, that the alleged agents had no authority to sell to him, that he had no right to any part of the purchase-money, that his right was to compensation only, and that there was nothing in the evidence which would permit him to hold the money above $13,000. It was this instruction which the court above said was error. It said